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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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03/13/2008

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601 Allendale Road

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EXAMINER

BOGART, MICHAEL G

ART UNIT

PAPER NUMBER

3761

MAIL DATE

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03/13/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/607,975	Applicant(s) ERDMAN, CAROL L.	
	Examiner MICHAEL G. BOGART	Art Unit 3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 31 January 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 5,7-9,11-13,15-26 and 54-73 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 5,7-9,11-13,15,16,20-26,54-61 and 63-73 is/are rejected.
- 7) ☒ Claim(s) 17-19 and 62 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 30 June 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Amendment

1. Applicant's request for reconsideration of the finality of the rejection of the last Office action is persuasive and, therefore, the finality of that action is withdrawn.
2. The indicated allowability of claims 6-9, 16, 54-56 and 58 is withdrawn in view of the newly discovered reference(s) to Lippert, Ying and Beplate. Rejections based on the newly cited reference(s) follow.

Claim Rejections § 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. § 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 9 and 16 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 9 recites the attachment of the first and second elastic portions to the main chassis in an edge to edge attachment. This contradicts the overlapping structure set forth in independent claim 5.

Claim 16 recites first and second elastic portions that are inelastic. An element can not be simultaneously elastic and inelastic.

Claim Rejections 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 5, 7, 9, 11, 16, 24-26, 54-59, 64-66 and 67-73 are rejected under 35 U.S.C. § 102(b) as being anticipated by Lippert *et al.* (US 4,861,652; hereinafter “Lippert”).

Regarding claim 5, Lippert teaches an absorbent article (10) having a front portion (44), a back portion (44a), a crotch portion and two side portions, the article (10) comprising:

a main chassis (12);

an absorbent portion (50); and

first and second elastic portions (44, 44a) which replace a portion (80) of the main chassis (12), each of said first and second elastic portion (44, 44a) having a first region that overlaps the main chassis for attachment thereto (connection to inner (20) or outer (18) surface of chassis (12)) and a second region (span over reduced-stiffness section (22)) that does not overlap the main chassis (20)(col. 3, lines 35-53),

the first elastic portion (44) positioned in the front portion (14) of the article (10) and the second elastic portion (44a) positioned in the back portion (14a) of the article (10),

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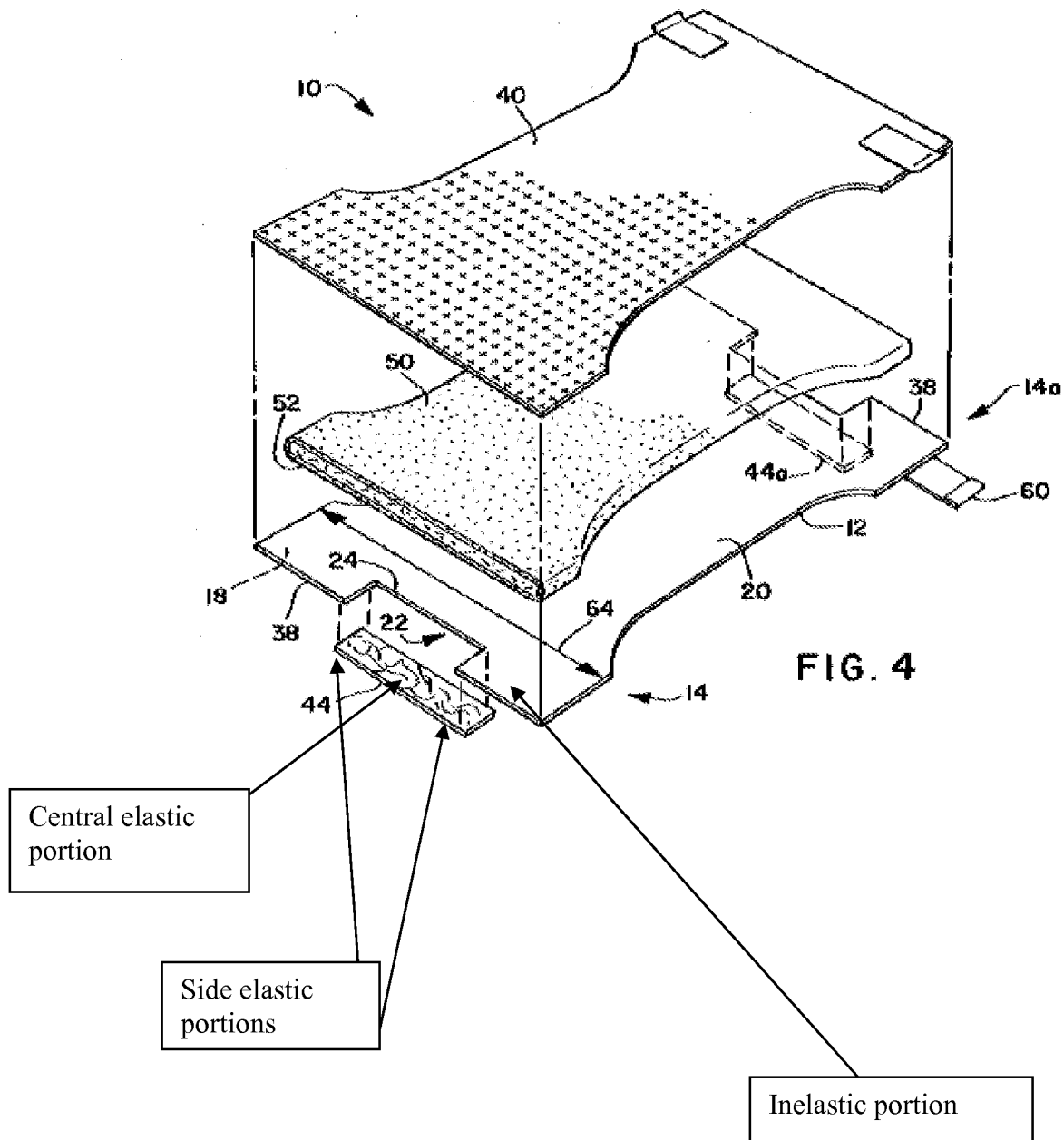
wherein both the first and second elastic portions (44, 44a) have a central portion positioned between the side portions of the article (10) having a lateral width less than a lateral width of the main chassis (12), and

wherein each central portion extends (from edge (38)) in a longitudinal direction towards the crotch portion (see fig. 4, *infra*). The central portion is interpreted herein as being the middle third of each elastic strip as measured in the direction that is transverse to the width of the chassis.

Regarding claims 7 and 9, see fig. 4, *infra*.

Regarding claim 11, Lippert's side elastic portions are construed herein as being the end one third of each elastic strip (44) on each side of the central portion as measured in the direction that is transverse to the width of the chassis (12)(see annotated fig. 4, *infra*).

Regarding claims 11, 16 and 59, in an alternative interpretation of the art, the elastic portions are construed to be the waistbands (14, 14a). The central elastic portion (44, 44a) has an inelastic side portion on each transverse side of the central portion. (*note, regarding all other claims, the first interpretation of the art above is applied unless otherwise noted).



Regarding claim 24, Lippert teaches rectangular elastic portions (44, 44a).

Regarding claim 25, Lippert teaches a diaper (see Title).

Regarding claim 26, diapers are a type of pant.

Regarding claims 54 and 70, Lippert teaches a carrier layer (40) operatively associated with the elastic portions (44, 44a)(col. 3, lines 35-53).

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Regarding claims 55 and 72, Lippert teaches that elastic elements (44, 44a) length a longitudinal length that is roughly the same as that of each of the side portions. Thus the length of the elastic portion is less than twice the length of one of the side portions.

Regarding claims 56, 57 and 73, Lippert teaches an elastic element (44) with a length (L). As noted in the discussion of claim 5, *supra*, each of the side portions is 1/3 the length of the elastic portion (44). Lippert's elastic portion has a greater transverse dimension than 1/3 or 2/3 of that dimension.

Regarding claims 58 and 71, Lippert teaches that chassis (12) may be a laminated layer. The top lamina of such a laminate can function as a carrier layer on the garment side of the elastic portion (44)(col. 4, lines 60-63).

Regarding claim 67, Lippert teaches rectangular elastic portions (44, 44a).

Regarding claim 68, Lippert teaches a diaper (see Title).

Regarding claim 69, diapers are a type of pant.

5. Claims 59-61 are rejected under 35 U.S.C. § 102(b) as being anticipated by Ying *et al.* (US 6,245,401 B1; hereinafter: "Ying").

Regarding claim 59, Ying teaches an absorbent article having a front portion, a back portion, a crotch portion, and two side portions, the article comprising:

a main chassis (70);

an absorbent portion (not shown); and

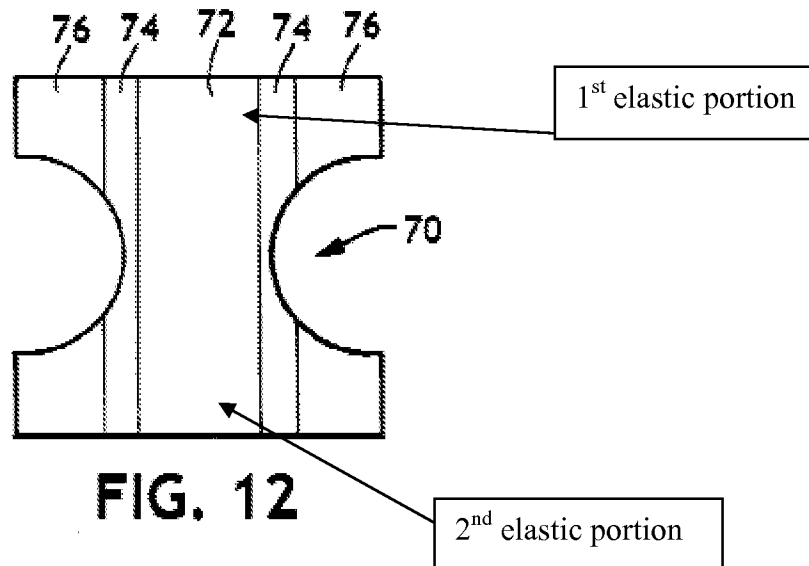
first and second elastic portions (72, 74) operatively associated with the main chassis (70), wherein the first elastic portion (72, 74) has a first central elastic portion (72) having a first lateral width less than a lateral width of the main chassis (70) and corresponding to the front portion of the article and two first side inelastic portions (74)

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corresponding to the side portions of the article, and wherein the second elastic portion (72, 74) has a second central elastic portion (72) having a second lateral width less than the lateral width of the main chassis (70) and corresponding to the back portion of the article and two second side inelastic portions (74) corresponding to the side portions of the article, and

wherein each central portion (72) extends in a longitudinal direction towards the crotch portion of the article (col. 2, lines 46-61; col. 15, lines 34-50)(see fig. 2, *infra*).

Regarding claims 60 and 61, see fig. 12, *infra*.



Claim Rejections – 35 USC § 103

The following is a quotation of 35 U.S.C. § 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. § 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
6. Claims 8 and 64 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Lippert.

Lippert does not expressly teach the claimed relative area of the first region to the second region.

Mere changes in size are not sufficient to patentably distinguish a claimed invention over the prior art. See *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

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7. Claims 5, 11-13, 15 and 20-23 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Beplate (US 5,221,277 A).

Regarding claim 5, Beplate teaches an absorbent article (10) having a front portion (14a), a back portion (14b), a crotch portion and two side portions, the article (10) comprising:

a main chassis (12, 30);

an absorbent portion (40); and

an elastic portion (15) which replace a portion (11) of the main chassis (12, 30), the elastic portion (15) having a first region that overlaps the main chassis (12) for attachment thereto (note stitching at attachment point in fig. 2) and a second region (span over cutout (11)) that does not overlap the main chassis (12, 30),

the elastic portion (15) positioned in the waist portion (14b) of the article (10),

wherein the elastic portion (15) has a central portion positioned between side portions of the article (10) having a lateral width less than a lateral width of the main chassis (12, 30), and

wherein each central portion extends (from waist edge) in a longitudinal direction towards the crotch portion (see fig. 2, *infra*). The central portion is interpreted herein as being the middle third of each elastic strip as measured in the direction that is transverse to the width of the chassis (see fig. 2, *infra*).

Beplate does not expressly disclose another elastic element in the opposite waistband (14a).

It has been held that mere duplication of the essential working parts of a device involves only routine skill in the art. *St. Regis Paper Co. v. Bemis Co.*, 193 USPQ 8. *In*

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re Harza, 274 F.2d 669, 124 USPQ 378 (CCPA 1960). One of ordinary skill in the art would have recognized the benefits of adding a second elastic element to the opposite waistband which would include providing limited elasticity at the opposite waistband for enhanced fit (col. 5, lines 49-57).

Regarding claim 11, Beplate's side elastic portions are construed herein as being the end one third of the elastic gore (15) on each side of the central portion as measured in the direction that is transverse to the width of the chassis (12, 30).

Regarding claims 12, 13 and 15, Beplate teaches that the central portion of the elastic member extends further towards the crotch portion than the side ports, see fig. 2, *infra*.

Regarding claim 20, Beplate teaches a triangular elastic gore (15)(see fig. 2).

Regarding claims 21-23, Beplate does not expressly disclose the claimed shapes or relative size of the elastic element. Mere changes in shape are not sufficient to patentably distinguish the claimed invention over the prior art unless that particular configuration is shown to be significant. See *In re Dailey*, 357 F.2d 669, 149 USPQ 47 (CCPA 1966). The claimed shapes would not perform in a significantly different manner than the triangle disclosed by Beplate.

Mere changes in size are not sufficient to patentably distinguish a claimed invention over the prior art. See *Gardner v. TEC Systems, Inc.*, *supra*. One of ordinary skill in the art would have recognized that the size of the elastic element could be modified to accommodate the specific physiques of individuals who will wear the diaper. For example, a patient with a distended stomach may require more elastic in the front waist portion than in the rear.

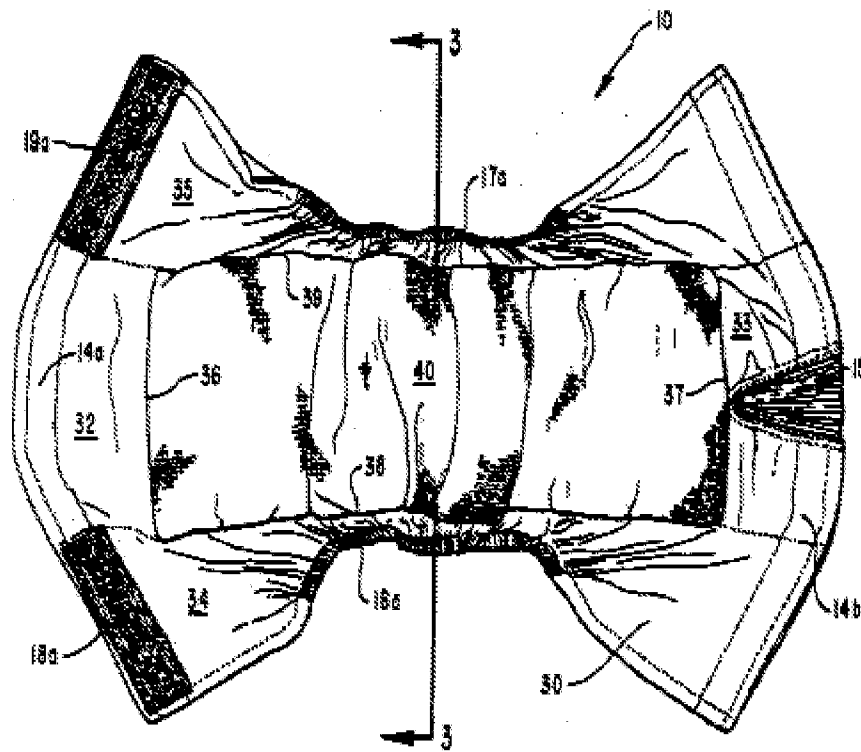


FIG. 2

8. Claims 63, 65 and 66 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Lippert in view of Beplate.

Lippert does not teach that the elastic portions are triangular.

Beplate teaches elastic waist portions (15) that are triangular. This design is known in the art to be effective at providing limited elasticity in a garment waistband. (see Beplate col. 5, lines 49-57).

Where a claimed improvement on a device or apparatus is no more than "the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for improvement," the claim is unpatentable under

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35 U.S.C. § 103(a). *Ex Parte Smith*, 83 USPQ.2d 1509, 1518-19 (BPAI, 2007)(citing *KSR v. Teleflex*, 127 S.Ct. 1727, 1740, 82 USPQ2d 1385, 1396 (2007)). Accordingly, Applicant claims a combination that only unites old elements with no change in the respective functions of those old elements, and the combination of those elements yields predictable results; absent persuasive evidence that the modifications necessary to effect the combination of elements is uniquely challenging or difficult for one of ordinary skill in the art, the claim is unpatentable as obvious under 35 U.S.C. § 103(a). *Ex Parte Smith*, 83 USPQ.2d at 1518-19 (BPAI, 2007)(citing *KSR*, 127 S.Ct. at 1740, 82 USPQ2d at 1396). Accordingly, since the applicant[s] have submitted no persuasive evidence that the combination of the above elements is uniquely challenging or difficult for one of ordinary skill in the art, the claim is unpatentable as obvious under 35 U.S.C. § 103(a) because it is no more than the predictable use of prior art elements according to their established functions resulting in the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for improvement.

Regarding claims 65 and 66, neither Lippert or Beplate expressly disclose the claimed shapes of the elastic element. Mere changes in shape are not sufficient to patentably distinguish the claimed invention over the prior art unless that particular configuration is shown to be significant. See *In re Dailey*, 357 F.2d 669, 149 USPQ 47 (CCPA 1966). The claimed shapes would not perform in a significantly different manner than the triangle disclosed by Beplate.

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Allowable Subject Matter

9. Claims 17-19 and 62 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Arguments

10. Applicant's arguments with respect to claims 5, 7-9, 11-13, 15, 16, 20-26, 54-61 and 63-73 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Bogart whose telephone number is (571) 272-4933.

In the event the examiner is not available, the Examiner's supervisor, Tatyana Zalukaeva may be reached at phone number (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300 for formal communications. For informal communications, the direct fax to the Examiner is (571) 273-4933.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (571) 272-3700.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for

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published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Michael G. Bogart/
Examiner, Art Unit 3761
27 February 2008
/Tatyana Zalukaeva/

Supervisory Patent Examiner, Art Unit 3761